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In The

Supreme Court of the United States

October Term, 1993

STEVEN L. ROSA (deceased), CHRISTINA ROSA, JOSHUA ROSA, AMBER ROSA, and NATHANIEL ROSA,

Petitioners,

v.

WARNER ELECTRICAL CONTRACTING, COLORADO COMPENSATION INSURANCE AUTHORITY and THE INDUSTRIAL CLAIM APPEALS OFFICE OF THE STATE OF COLORADO,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Colorado

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a state mandated reduction in worker's compensation benefit levels, which is not expressly prohibited by Congress and which is calculated according to the amount of a Social Security award, decreases the value of the recipient's Social Security award and is therefore invalid under the supremacy clause of the Constitution, Article VI, Clause 2, unless Congress specifically authorizes the states to make the reduction.

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No. 93-

In The

Supreme Court of the United States

October Term, 1993

STEVEN L. ROSA (deceased), CHRISTINA ROSA, JOSHUA ROSA, AMBER ROSA, and NATHANIEL ROSA,

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v.

WARNER ELECTRICAL CONTRACTING, COLORADO COMPENSATION INSURANCE AUTHORITY and THE INDUSTRIAL CLAIM APPEALS OFFICE OF THE STATE OF COLORADO,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Colorado

PETITION FOR A WRIT OF CERTIORARI

Christina Rosa, Joshua Rosa, Amber Rosa, and Nathaniel Rosa respectfully petition the Court to issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Colorado, issued on January 31, 1994.

OPINIONS BELOW

The opinion of the Supreme Court of Colorado is reported at 870 P.2d 1210 and is set out in Appendix A.

The Court's order denying rehearing, dated February 28, 1994, appears in Appendix B.

The opinion of the Colorado Court of Appeals is reported at 849 P.2d 845 and is set out in Appendix C. The final order of the Industrial Claim Appeals Office of the State of Colorado, which is the administrative appeals agency for workers' compensation claims,[1] was entered on August 27, 1991. It is set out in Appendix D and is not reported. The Findings of Fact, Conclusions of Law and Order of the Administrative Law Judge of the Colorado Division of Labor, Workers' Compensation Section, was entered on April 22, 1991. It is set out in Appendix E and is not reported.

JURISDICTION OF THE SUPREME COURT

The judgment and opinion of the Supreme Court of Colorado were issued on January 31, 1994. On February 28, 1994, the court denied a timely petition for rehearing.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. This petition is timely filed on Friday, May 27, 1994, which is the 88th day after rehearing was denied by the Supreme Court of Colorado. Rule 13.1 of the United States Supreme Court.

[1] The Industrial Claim Appeals Office is a statutory defendant in all judicial proceedings to challenge its final orders. Section 8-43-307(1), 3B C.R.S. (1993 Supp.)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Supremacy Clause, Article VI, Clause 2 of the United States Constitution, states in pertinent part, that

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 8-50-103, 3B C.R.S. (1986 Repl.Vol.) states:

> **8-50-103. Death Benefits.** In case of death, the dependents of the deceased entitled thereto shall receive as compensation or death benefits sixty-six and two-thirds percent of the deceased employee's average weekly wages, not to exceed a maximum of eighty percent of the state average weekly wage per week for accidents occurring on or after September 1, 1975, and not less than a minimum of twenty-five percent of the applicable maximum per week. In cases where it is determined that periodic death benefits granted by the Federal Old Age, Survivors, and Disability Insurance Act or a workmen's compensation act of another state or the federal government are payable to an individual and his dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to 100 percent of such periodic benefits.

Portions of 42 U.S.C. §§ 402(d) and 402(g) and 42 U.S.C. § 424a appear in Appendix F.

STATEMENT OF THE CASE

A

Steven L. Rosa was electrocuted on July 2, 1987, while in the scope and course of his employment with Warner Electrical Contracting. At the time of his death, Mr. Rosa's wife and three children were totally dependent upon him for support. Accordingly, they were eligible for death benefits under section 8-50-103, 3B C.R.S. (1986 Repl.Vol.), now codified with changes at section 8-42-114, 3B C.R.S. (1993 Supp.)[2]

Pursuant to 42 U.S.C. § 402(d), the Social Security Administration awarded each of Mr. Rosa's children $356 per month in "children's benefits." Children's benefits are paid to surviving dependent children of a deceased wage earner and are generally paid until a child reaches the age of sixteen. 42 U.S.C. § 402(s)(1). Benefits are equal to 75% of the deceased wage earner's primary insurance amount. 42 U.S.C. § 402(d)(2).

Pursuant to U.S.C. § 402(g), Mr. Rosa's wife Christina was awarded $356 per month in "mother's benefits." Mother's and father's benefits are awarded to a surviving spouse responsible for the care and maintenance of dependent children of the deceased wage earner. They are payable only until the last dependent child ceases to

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[2] In Colorado, "Disability benefits paid to a worker and death benefits awarded to a worker's dependents are entirely independent of one another. This results in 'two distinct rights – one for the benefit of the workman and the other for the benefit of his dependents.' " *Richards v. Richards & Richards*, 664 P.2d 254, 255 (Colo.App. 1983) (cert. denied, 1983).

be eligible for children's benefits. Like children's benefits, mother's benefits are paid at the rate of 75% of the deceased wage earner's primary insurance amount.

Because Mr. Rosa's survivors received $1,424 per month in Social Security survivor's benefits, and because this exceeded the $1,385.49 per month payable under the Colorado Workers' Compensation Act, an administrative law judge for the Colorado Division of Labor ruled on September 14, 1987, that the offset provision in section 8-50-103 reduced petitioners' worker's compensation death benefits to zero. Although petitioners did not appeal this ruling, they retained counsel and objected to the offset on the ground that section 8-50-103 was pre-empted by the Social Security Act. The Director of the Division of Labor then allowed petitioners to reopen their case and assert their constitutional challenge to the offset. Because administrative law judges and the Industrial Claim Appeals Office have no jurisdiction to consider a constitutional challenge to any state law, *see Kinterknecht v. Industrial Commission*, 175 Colo. 60, 485 P.2d 721 (1971), they both declined to address petitioners' pre-emption claims.

On appeal, the Colorado Court of Appeals held that the offset provisions of section 8-50-103 were not pre-empted by the Social Security Act. The Colorado Supreme Court granted discretionary review pursuant to Colorado Appellate Rules 49 *et seq.* and also ruled that Colorado's death benefits offset was not pre-empted, although its ruling was based on different grounds.

B

Death benefits were included in Colorado's first Workers' Compensation Act. *See*, Laws 1915, chapter 179, § 57, at page 549.

After 1975, death benefits were payable to a wholly dependent widow for life or until remarriage. They were also payable to totally dependent minor children until they became eighteen years old, or if they continued to attend school, until they became twenty-one. *Western Gas v. Industrial Claim Appeals Office*, 797 P.2d 823 (Colo.App. 1990).

Although disability benefits were first subject to an offset for Social Security disability benefits in 1963, *see* Laws 1963, chapter 180, § 10 at page 645, a parallel offset provision was not incorporated into the death benefits statute until 1975. *See*, Laws 1975, chapter 71, § 19, at page 299, which required workers' compensation death benefits to be reduced by 100% of the amount of Social Security survivor's benefits.

Since virtually all wage earners are fully insured at the time of death, the 100% offset meant that the vast majority of surviving dependents, like Mrs. Rosa and her children, receive nothing in workers' compensation death benefits. Furthermore, since surviving dependents are required to apply for all social security benefits for which they may be eligible, and will have their workers' compensation benefits reduced by the amounts for which they are eligible even if they don't apply, there is simply no way of avoiding the offset. *Hurtado v. CF&I Steel Corporation*, 168 Colo. 37, 449 P.2d 819 (1969).

Between 1975 and 1991, workers' compensation death benefits were subject to a 100% offset for Social Security survivors' benefits, while workers' compensation disability benefits were only subject to a 50% offset.

The 1991 legislature reduced the death benefits offset to 50%. Laws 1991, chapter 223, § 5 at page 1351.

Five states other than Colorado – Alaska, Minnesota, New Jersey, New York, and Utah – require a reduction of workers' compensation death benefits by some percentage of Social Security survivor's benefits.[3]

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[3] Alaska: ALASKA STAT. ANN. § 23.30.225 (workers' compensation benefits reduced by 50% of federal survivors benefits); Minnesota: MINN. STAT. § 176.111 subdivision 21 (combined total of weekly "government survivors benefits' and workers' compensation death benefits must not exceed 100% of the weekly wage earned by the deceased worker at the time of injury; no workers' compensation benefits paid when federal survivors benefits exceed 100% of weekly wage, workers' compensation death benefits paid to surviving spouse may not be reduced on account of children's benefits if children are not in the surviving spouse's custody); New Jersey: N.J. STAT. ANN. § 34:15-95 4 (Second Injury Fund liability for enhanced payments to survivors of workers killed before January 1, 1980, enhancement to be reduced by an amount equal to survivors benefits paid under the Social Security Act); New York: MCKINNEY'S CONSOLIDATED LAWS OF NY, Book 64, § 16 (if death occurs after January 1, 1978, and if there is a surviving spouse and no children under the age of 18 years or under 23 if enrolled as full time students, workmen's compensation death benefits are reduced by 5% of the spouse's share of survivors insurance benefits under the Social Security Act for each $10 of the deceased's average weekly wage in excess of $100, with a maximum reduction of 50% of the Federal Social Security survivors benefits; similar formula if there are surviving children and a surviving spouse); Utah: UTAH CODE ANN. § 35-1-68(2)(A)(II) (6 years after the worker's death, worker's compensation death benefits shall be reduced by 50% of any Social Security survivors' benefits – no reduction during the first six year period after death).

C

In the Social Security Amendments of 1939, P.L. 76-666, § 201, 53 Stat. 1364-1368, Congress provided benefits for surviving children and widows[4] of wage earners who died before reaching retirement age. A widow was eligible for three-fourths of her husband's primary insurance amount, but only if her husband also left dependent children who were eligible for children's benefits. These same provisions are still in the Act. 42 U.S.C. § 402(g).

Surviving children were eligible for one-half of the deceased wage earner's primary insurance amount. The total family benefit, however, could not exceed two times the primary benefit amount, 80% of the worker's average wages, or $85.00 per month, whichever was less. 53 Stat. 1367.

The present statute gives each surviving child and the surviving spouse three-fourths of the wage earner's primary insurance amount. The family maximum is determined by a complex formula in 42 U.S.C. § 403. *See also,* the explanation in 20 C.F.R. § 404.403.

No provision of the Social Security Act or of the regulations promulgated thereunder has *ever* authorized the states to reduce their statutorily mandated worker's compensation death benefits by some percentage of the Social Security benefits payable to the deceased worker's

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[4] Widower's survivor's benefits were not available until this Court held that it was a denial of Equal Protection to give benefits to surviving wives but not surviving husbands. *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975).

survivors. Nor, for that matter, has any provision of the Act or of the Social Security regulations ever authorized the Secretary to reduce survivors' benefits by some percentage of workers' compensation death benefits.[5]

By 1938, forty-four states and the (then) Territories of Alaska and Hawaii[6] had workers' compensation statutes which paid dependent surviving spouses and children benefits on account of a workers' death from job related activities. When Congress provided for Social Security survivors' benefits in 1939, then, it knew that in over 91% of the states a worker's dependents would be receiving death benefits from Social Security and from the workers' compensation insurer. That situation existed for 36 years, or until 1975, when Colorado passed the first death benefits offset statute.

Although both the Social Security Board and the Advisory Council on Social Security recommended in 1938 that the Social Security program provide benefits for totally disabled wage earners, disability benefits did not become part of the Act until eighteen years later, in 1956. Social Security Amendments of 1956, P.L. 84-880, 70 Stat. 816. Section 103 of the Amendments added a new section 223 to the Social Security Act, which was later codified at

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[5] Only the Railroad Retirement Act of 1974 allows offsets for workers' compensation death benefits. *See*, 42 U.S.C. § 405(o). *And see*, 42 U.S.C. § 403, which is entitled "Reduction of Benefits" and which provides reductions in children's, mother's and father's benefits under certain circumstances, but *not* because the survivors are also receiving worker's compensation or other death or survivor's benefits.

[6] The remaining four states had passed death benefits provisions by the early 1950s.

42 U.S.C. § 423. It was entitled "Disability Insurance Benefit Payments" and provided benefits for all wage earners who were between the ages of 50 and 65 and who were unable "to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration." Sections 223(a)(1)(b) and 223(c)(2). This is essentially the same test for disability which appears in the current statute. 42 U.S.C. § 423(c)(2). The eligible age limit was subsequently lowered to eighteen, and dependents' benefits were added by the Social Security Amendments of 1958, P.L. 85-840, § 205, 72 Stat. 1013.

P.L. 84-880 also added a new Section 224 to the Social Security Act. Section 224 was entitled "Reduction of Benefits Based on Disability" and stated in pertinent part that "If . . . any individual is entitled to a disability insurance benefit . . . and . . . it is determined that a periodic benefit is payable . . . to such individual under a workmen's compensation law or plan of the United States or of a State on account of a physical or mental impairment of such individual, then the benefit referred to in paragraph (1) shall be reduced (but not below zero) by an amount equal to such periodic benefit. . . . "

In *Richardson v. Belcher*, 404 U.S. 78, 82 (1971), this Court commented that "it is self-evident that the offset reflected a judgment by Congress that the workmen's compensation and disability insurance programs in certain instances served a common purpose, and that the workmen's compensation program should take precedence in the area of overlap." Because Congress has not

enacted any offset provision for survivors' benefits, however, it has expressed no similar concern over any overlap between Social Security survivors' benefits and state workers' compensation death benefits.

Section 224 was repealed in 1958. Social Security Amendments of 1958, P.L. 85-840, § 206, 72 Stat. 1013. After public hearings before the Senate Committee on Finance, the 89th Congress reenacted a modified offset provision. P.L. 89-97, Section 335, 79 Stat. 406, now codified at 42 U.S.C. § 424a.

Section 424a was entitled "Reduction of Benefits Based on Disability on Account of Receipt of Workmen's Compensation." It provided that disabled wage earners who received both Social Security disability benefits and benefits "under a workmen's compensation law or plan of the United States or a State . . . " would have their Social Security disability benefits reduced by the amount of these workmen's compensation benefits, but only to the extent the combined benefits exceeded 80% of the worker's "average current earnings." For purposes of this computation, the total of the disabled wage earner's primary insurance amount *and* any amounts payable to his spouse and children under 42 U.S.C. § 402 were included in the offset formula.

Section 424a also included the following provision:

> (d) The reduction of benefits required by this section shall not be made if the workmen's compensation law or plan under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this title on the basis of wages and self-

> employment income of an individual entitled to benefits under section 223.

Section 424a(d) "thus allows the state[s] to recoup for [themselves] the savings created by the Section 424a(a) reduction." *Sciarotta v. Bowen*, 837 F.2d 135, 137 (3rd Cir. 1988). "Furthermore, if a state chooses to implement a reduction in state benefits because a recipient is simultaneously receiving federal disability benefits, this section allows the state's reduction to take precedence, and recludes the Secretary from implementing a second, double, offset." *Id.*

In 1981, Congress limited the states' ability to substitute their own offsets for those allowed the Social Security Administration by section 424a(1) by further amending section 424a and adding the italicized language to subsection (d):

> The reduction of benefits required by this section shall not be made if the workmen's compensation law or plan under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this title on the basis of wages of and self-employment income of an individual entitled to benefits under section 223, *and such law or plan so provided on February 1, 1981.* (emphasis added)

Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, § 2208, 95 Stat. 839, approved on August 31, 1981. Only twelve states – Alaska, Colorado, Florida, Louisiana, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oregon, Washington, and Wisconsin – had enacted offset provisions for Social Security disability benefits between 1965, when they were first authorized to do so, and 1981, when they were prohibited from doing

so. Colorado's offset is a flat 50% of federal benefits. Section 8-42-103(1)(a)(I), 3B C.R.S. (1993 Supp.).

REASONS FOR ISSUING THE WRIT

Judicial opinion is evenly divided about whether, in the absence of express Congressional permission, the states can reduce mandatory state benefits solely because the recipient is also the beneficiary of a Social Security award.

In *McClanathan v. Smith*, 186 Mont. 56, 606 P.2d 507 (1980) (rehearing denied) and *Raskin v. Moran*, 684 F.2d 472 (7th Cir. 1982), the courts held that such offsets frustrated the will of Congress by indirectly reducing the value of their federal benefits, and were invalid unless expressly authorized by Congress. In *Harris v. State Department of Labor and Industries*, 120 Wash.2d 461, 843 P.2d 1056 (1993) (reconsideration denied) (Johnson, J., dissenting) and in the case at bar, the courts reached precisely the opposite result. They held that offsets were valid unless prohibited by Congress.

McClanathan involved a challenge to Montana's 1974 statute which required a 100% offset of Social Security benefits against workers' compensation disability benefits. The court held that, "The statute is in total opposition to federal legislation, in that it deprives a claimant of benefits provided by Social Security legislation." *Id.* at 606 P.2d 512.

In *Raskin*, a Wisconsin statute reduced the salaries of reserve judges over the age of 70 by the exact amount of

their Social Security retirement benefits. The Seventh Circuit held that even though this offset was not expressly prohibited by any provision of the Social Security Act, it was void because it frustrated the will of Congress and was in conflict with 42 U.S.C. § 403(f)(3). Section 403(f)(3) allowed wage earners over the age of 70 to receive full Social Security benefits regardless of their contemporaneous earnings. The court specifically held that

> [A]lthough the SSA does not expressly preclude the application of state law which might incidentally affect some aspect of social security, we have no doubt that a state statute which effectively denies benefits conferred by section 203 would be suspect under the supremacy clause.
>
> * * *
>
> [A]lthough not *directly* preventing or impeding plaintiffs' receipt of social security benefits, Wisconsin effectively deprives the recipient of those federal benefits by reducing plaintiffs' salaries in an amount precisely equal to the federal benefits. Indeed, we would put form over substance if we held that only direct efforts to reduce, divert or eliminate social security benefits were in conflict with section 203(f)(3).

Id. at 676 and 677 (footnotes omitted) (emphasis in original)

Harris dealt with a Washington law which reduced workers' compensation disability benefits by the disabled worker's Social Security retirement benefits. Even though 42 U.S.C. § 424a only allows state offsets for Social Security *disability* benefits, and even though no statute grants permission for the states to apply offsets against Social

Security survivors' benefits, the Washington Supreme Court found no pre-emption because it found no "clear evidence of congressional intent to pre-empt state reverse offsets of federal social security retirement benefits." *Id.* at 843 P.2d 1060. The court rejected the Seventh Circuit's holding in *Raskin* and held that offsets are permissible unless Congress specifically prohibits them.

In the case at bar, the Colorado Supreme Court followed *Harris* and held simply that there was no evidence that Congress had intended to forbid those offsets which it did not expressly authorize, and that in the absence of such a prohibition, they were not invalid. *Id.* at 870 P.2d 1213.

Pyke v. Department of Social Services, 182 Mich.App. 619, 453 N.W.2d 274 (1990) was cited with approval in both *Harris* and *Rosa*. It also holds, in a slightly different context, that reductions in state benefits based on the receipt of Social Security benefits "has no effect on the amount of SSI benefits [the claimant] receives" and that absent an express prohibition the offsets were not pre-empted. *Id.* at 453 N.W.2d 278.

Although these cases do not all involve the same sections of the Social Security Act, and are therefore somewhat distinguishable, they all involve the same fundamental legal question: whether, in the absence of expressed congressional consent for the states to reduce state benefits by the amount of federal Social Security benefits, the states may nonetheless presume that Congress gave its consent to such reductions simply because Congress did not expressly prohibit them.

This is an extremely important question for this Court to answer because of the increasingly diverse array of benefits under the Social Security Act, other federal statutes, and state laws. Furthermore, as pressure increases to reduce state budgets and to appease special interest groups who must pay state mandated benefits such as those under the workers' compensation laws, a painless and hence very tempting escape is for state legislatures to pass the burden back to the federal government by announcing that state and federal benefits overlap, and that state benefits to recipients of federal benefits will therefore be reduced proportionately. *See*, e.g., *Raskin* at 478: "While pleading its concern with 'double dipping,' Wisconsin must concede that it is directly regulating judicial salaries based upon, *inter alia*, the receipt of federal benefits."

In a different context, this Court has held that the use of offsets is every bit as invidious an attack on federal benefits as a direct writ of attachment:

> . . . an offsetting award, however, would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from his benefit check. The harm might well be greater.

Hisquierdo v. Hisquierdo, 439 U.S. 572, 588 (1979). *And see*, *Raskin*, at 479: "This setoff is the financial equivalent of not receiving their social security benefits and, therefore, frustrates the will of Congress." If the Seventh Circuit is correct, and *Hisquierdo* suggests that it is, the states are continuing to indirectly decrease the value of federal benefits through the use of offsets against state benefits when they have no legal right to do so. Whether they are

or are not allowed to use these offsets, however, the Court should clarify the law for them, for Congress, and for the millions of recipients of both state and federal benefits.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the January 31, 1994, judgment and opinion rendered by the Supreme Court of Colorado in this case and resolve a significant issue which concerns the relationships between state and federal governments and the public assistance benefits which they pay or mandate others to pay.

Respectfully submitted,

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APPENDIX A

The Opinion of the Supreme Court of Colorado

SUPREME COURT OF COLORADO
NO. 92SC689 January 31, 1994

STEVEN L. ROSA (Deceased), CHRISTINA ROSA, JOSHUA ROSA, AMBER ROSA, and NATHANIEL ROSA, Petitioners,

v.

WARNER ELECTRICAL CONTRACTING, COLORADO COMPENSATION INSURANCE AUTHORITY, and THE INDUSTRIAL CLAIM APPEALS OFFICE OF THE STATE OF COLORADO, Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT AFFIRMED

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JUSTICE ERICKSON delivered the Opinion of the Court.

We granted certiorari to review *Rosa v. Warner Electrical Contracting*, 849 P.2d 845 (Colo. App. 1992), which held that section 8-50-103, 3B C.R.S. (1986) (now codified with changes at section 8-42-114, 3B C.R.S. (1993 Supp.)), does not violate the Supremacy Clause of the United States Constitution. We agree with the court of appeals that section 8-50-103 is not preempted by the Social Security Act.

I

Steven L. Rosa (Rosa) was electrocuted while working in the course and scope of his employment. Rosa's employer, Warner Electrical Contracting Company, and its insurer, Colorado Compensation Insurance Authority (collectively the respondents), admitted liability for the death. At the time of his death, Rosa's wife and three children (collectively the petitioners) were totally dependent on him for support. Because Rosa was killed in the course and scope of his employment, petitioners are eligible for workers' compensation death benefits in the amount of $1,385 per month. § 8-50-103, 3B C.R.S. (1986) (now codified with changes at section 8-42-114, 3B C.R.S. (1993 Supp.)).[1]

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[1] Rosa's average monthly wage was $2,078. Absent any reduction for Social Security benefits, two-thirds of this amount,

Pursuant to 42 U.S.C. § 402(d) (1988), the Social Security Administration awarded each of Rosa's children "children's benefits" in the amount of $356 per month.[2] Pursuant to 42 U.S.C. § 402(g) (1988), Rosa's widow was awarded $356 per month in "mother's benefits."[3]

On September 14, 1987, an administrative law judge (ALJ) for the Division of Labor entered an order regarding the petitioners' workers' compensation benefits. Because the petitioners received $1,424 per month in social security survivors' benefits, and because this exceeded the $1,385 per month payable under the Workers' Compensation Act, the ALJ reduced the petitioners' workers' compensation benefits to zero pursuant to the offset provision in section 8-50-103. This order was not appealed. Subsequently, however, Rosa's wife and children retained counsel and objected to the offset. As a result, the Director of the Division of Labor entered an order reopening the claim to allow the petitioners to address the constitutionality of the offset.

$1,385, would have been payable each month as death benefits under the Workers' Compensation Act.

[2] Children's benefits are paid to the surviving dependent children of a deceased wage earner. 42 U.S.C. § 402(d)(1), 402(s) (1988). The benefits are equal to seventy-five percent of the deceased wage earner's primary insurance amount. *Id.* at § 402(d)(2) (1988).

[3] "Mother's benefits" are payable only until the last dependent child ceases to become eligible for children's benefits. Like children's benefits, mother's benefits are paid at the rate of seventy-five percent of the deceased wage earner's primary insurance amount. 42 U.S.C. § 402(g)(2) (1988).

An ALJ conducted a hearing regarding the offset and ruled that she did not have the authority to address whether the offset was constitutional. Therefore, the ALJ allowed the offset to stand. The petitioners appealed the ALJ's order to the Industrial Claim Appeals Office (ICAO) which affirmed the ALJ stating that the ICAO had no jurisdiction to consider the constitutionality of the statute.

The petitioners appealed the decision of the ICAO and the court of appeals held that because 42 U.S.C. § 424a(d) (1988) permits a state to offset workers' compensation benefits, section 8-50-103 does not violate the Supremacy Clause of the United States Constitution. We granted certiorari to determine whether section 8-50-103 violates the Supremacy Clause. Both parties concede that section 42 U.S.C. § 424a(d) relates to disability benefits and does not apply to survivors' benefits. Although we affirm the result reached by the court of appeals, we disagree with the court of appeals analysis.

II

The preemption doctrine is derived from the Supremacy Clause in Article VI, Clause 2 of the United States Constitution. There are several ways Congress can preempt state law. Congress can expressly declare that states are precluded from legislating in an area of law. When Congress does not expressly preclude state legislation, state legislation may be preempted as a result of implied preemption or conflict preemption. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.* 461 U.S. 190, 203-204 (1983). The petitioners do not claim

that express language exists anywhere in the Social Security Act which prohibits a state from offsetting social security survivors' benefits against workers' compensation death benefits. Instead, the petitioners maintain that Congress implicitly forbids states from offsetting social security survivors' benefits against workers' compensation death benefits and that the Colorado law interferes with, or contradicts, federal policy.

Preemption will be implied if the federal regulatory scheme is so pervasive, or the federal interest is so dominant, that state law must be assumed to be preempted. Implied preemption is sometimes referred to as a congressional intent to "occupy the field." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748 (1985). To determine if a federal law implicitly preempts a state statute, a court must ascertain Congress' intent in enacting the federal statute. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983); *see also CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993) (stating that courts must seek "evidence of preemptive purposes . . . in the text and structure of the statute"). Similarly, in determining whether a state law conflicts with a federal law: "The purpose of Congress is the ultimate touchstone." *Retail Clerks Int'l Assoc., Local 1625 v. Schermerhorn*, 375 U.S. 96, 100 (1963).

An analysis of federal preemption issues begins with "the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). When Congress legislates "in a field which the States have traditionally occupied" courts will not apply preemption unless that is the "clear and manifest purpose

of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The petitioners contend that two provisions of the Social Security Act, 42 U.S.C. § 402 and 42 U.S.C. § 407, set forth a policy that is inconsistent with the Colorado offset provision in section 8-50-103 and thus Congress implicitly preempted the Colorado statute. Neither section 402 nor section 407 indicates that Congress intended to prohibit states from offsetting social security survivors' benefits against workers' compensation death benefits.

A

The petitioners assert that because Congress addressed the interrelationship between social security disability benefits and workers' compensation disability benefits, but was silent with regard to the interrelationship between social security survivors' benefits and workers' compensation death benefits, Congress intended to forbid states from offsetting survivors' benefits.[4]

Section 424a allows the federal government to offset state workers' compensation disability benefits against social security disability benefits. 42 U.S.C. § 424a (1988). Congress also provided that if a state offsets federal social security benefits, the state offset prevails. *Id.* Therefore, the federal government is allowed to offset benefits

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[4] The basis of this argument is that because Congress' intent can be determined by applying ordinary rules of statutory construction, *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993), the principle *expressio unius est exclusio alterius* is determinative of the preemption issue.

unless the state enacts a reverse offset.[5] The petitioners contend that because 42 U.S.C. § 402 does not address the issue of federal or state offsets of benefits, Congress intended to prohibit states from offsetting survivors' benefits.

The petitioners rely on *Raskin v. Moran*, 684 F.2d 472 (7th Cir. 1982), which addressed the issue of whether a Wisconsin statute was preempted by the Social Security Act. The state statute reduced the salaries of state reserve judges by an amount equal to their federal social security retirement benefits. The reserve judges contended that the statute was preempted by 42 U.S.C. § 403(f)(3) (1988). Section 403(f)(3) provides that any income earned after an individual's seventieth birthday will not be used to reduce his social security benefits. The Seventh Circuit held that the state statute was preempted by section 403(f)(3) and stated that although the state statutory offset did not directly affect the reserve judges' right to receive social security benefits, the effect of the offset was "the financial equivalent" of such a deprivation, and it represented "a clear frustration" of the purpose of the federal statute. *Raskin*, 684 F.2d at 479-80. The court based its decision on the "quite apparent underlying goals of the federal statute." *Id.* at 480.

Raskin held that section 403(f)(3) sets forth a clear statement of Congress' intent to prohibit offsetting social security retirement benefits against earned income.

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[5] The federal government's deduction of a state's workmen's compensation disability benefits is referred to as an "offset"; a state's deduction of federal disability benefits is referred to as a "reverse offset."

Courts that have interpreted *Raskin* have required an equally clear expression of Congress' intent before pre-empting a state statute. *See Barnes v. District of Columbia*, 611 F. Supp. 130, 134 (D. D.C. 1985) (holding that a District of Columbia statute that reduced individuals' salaries dollar for dollar by the amount of their military pensions was not preempted because Congress did not express a "clear goal of protecting federal benefits"); *Harris v. State Dep't of Labor & Industries*, 843 P.2d 1056, 1060 (Wash. 1993) (declining to infer preemption from Congress' silence because "42 U.S.C. § 424a does not contain clear evidence of congressional intent to preempt state reverse offsets of federal social security retirement benefits"); *Pyke v. Dep't of Social Services*, 453 N.W.2d 274, 277-78 (Mich. App. 1990) (distinguishing *Raskin* because it was based on express statutory intent that federal payments not affect the receipt of other payments).

Section 424a by its express terms is only applicable to disability benefits. 42 U.S.C. § 424a (1988). The legislative history regarding the enactment, repeal, and reenactment of this section demonstrates that Congress was addressing the interrelation of disability programs. *See* Social Security Amendments of 1956, Pub. L. No. 84-880, 70 Stat. 816 (1956) (enacting offset for workers' compensation disability benefits); Social Security Amendments of 1958, Pub. L. No. 85-840, 72 Stat. 1013 (1958) (repealing the disability offset provision); Pub L. No. 89-97, 79 Stat. 406 (reenacting offset provision). The Supreme Court has declared: "It is self-evident that the offset reflected a judgment by Congress that the workmen's compensation and disability insurance programs in certain instances

served a common purpose, and that the workmen's compensation programs should take precedence in the area of overlap." *Richardson v. Belcher,* 404 U.S. 78, 82 (1971).

The legislative history of section 424a indicates that Congress was addressing only disability benefits and was not attempting to outline a broader policy which would affect other sections of the Social Security Act. Even if a broad federal policy could be derived from section 424a, that policy would be that a state offset takes precedence if it overlaps with federal law, not that a state is prohibited from offsetting federal benefits. A policy of allowing a state offset to take precedence over a federal offset is not evidence of Congress' intent to preempt state offsets. Thus, section 424a does not provide a sufficient expression of Congress' intent to infer federal preemption. Similarly, the section does not reflect a broad federal policy which conflicts with the Colorado law. *See New York Dep't of Social Servs. v. Dublino,* 413 U.S. 405 (1973) (stating that the exercise of federal supremacy is not to be lightly presumed).

B

The "anti-alienation" provision of the Social Security Act provides that Social Security benefits shall not be "subject to execution, levy, attachment, garnishment, or other legal process . . . ." 42 U.S.C. § 407(a) (1988). The petitioners assert that Congress' intent in enacting section 407 was to prevent social security benefits from being diminished and that because Colorado's offset statute diminishes the value of benefits provided under federal law, the statute is preempted.

The petitioners rely on two cases to support their position: *Phillpot v. Essex County Welfare Board*, 409 U.S. 413, 415 (1973) (stating that the welfare department's attempt to attach a welfare recipient's bank account violated section 407); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979) (holding that the anti-alienation provision of 45 U.S.C. § 231m (1988) prohibits an individual from receiving equivalent property to her husband's Railroad Retirement Benefits as part of a divorce). In both of these cases, the Court applied anti-alienation provisions to prohibit the use of a legal process to transfer social security benefits to a third party. The petitioners maintain that Colorado's offset provision qualifies as a transfer and the workers' compensation insurer is the third party that receives the benefit of the transfer.

In the context of offsetting social security benefits against pensions, courts have rejected the expansion of the anti-alienation provision. In *Hurd v. Illinois Bell Telephone Co.*, 136 F. Supp. 125, 141 (N.D. Ill. 1955), *aff'd*, 234 F.2d 942 (7th Cir.), *cert. denied*, 352 U.S. 918 (1956), the plaintiffs contended that offsetting their social security retirement benefits against their pension benefits would cause "a corresponding shift in the economic benefit of the Social Security payment, and therefore a transfer under Sec. 407." The Illinois court rejected this argument and held that section 407 "was directed at the ordinary type of transfer or assignment such as a wage assignment" and that section 407 is "concerned only with guaranteeing that the worker would actually receive for his own use the amount due him under the Social Security Act." *Id.* In reaching this result, the court examined the

legislative history of the Social Security Act and concluded that Congress was well aware that offsets would be taken and did not intend to invalidate these offsets.

Similarly, in *Lamb v. Connecticut General Life Insurance Co.*, 643 F.2d 108 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981), the Third Circuit ruled that offsetting social security cost-of-living increases against insurance benefits did not violate section 407. The court distinguished *Phillpot* and *Hisquierdo* because: "Both cases involved the transfer of Social Security payments to a third person through legal process. Here, Lamb's legal right to receive her Social Security payments and the increases is uncontested." *See also Raskin*, 684 F.2d at 476 n.7 (holding offsetting social security benefits does not violate section 407); *Poisson v. Allstate Life Ins. Co.*, 640 F. Supp. 147 (D. Me. 1986) (same); *Lessard v. Metropolitan Life Ins. Co.*, 568 A.2d 491 (Me. 1989) (same); *Pyke*, 453 N.W.2d at 276 (Mich. App. 1990) (same).

Section 407 is not applicable because it was designed to prevent the use of traditional legal process to allow a third party to receive another individual's social security benefits. In this case, the petitioners will receive their social security benefits. Section 8-50-103 does not prohibit a worker from receiving social security benefits. The statute reduces workers' compensation benefits because support of the worker's dependents is being provided under a federal program.

C

Any doubt about Congress' intent to allow states to offset social security survivors' benefits against workers'

compensation death benefits is resolved by Congress' decision to create the National Commission on State Workmen's Compensation Laws.

In 1969, the United States Congress created the National Commission on State Workmen's Compensation Laws (National Commission). Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590, 1616-1618 (1970). Congress charged the National Commission with determining "the relationship between workmen's compensation on the one hand, and old-age, disability, and survivors insurance . . . on the other hand." *Id.* at 1618.

In its report, the National Commission recommended that states offset social security survivors' benefits against workers' compensation death benefits. As a result of the National Commission's study, the Colorado General Assembly amended section 8-50-103 and, for the first time, enacted a one-hundred percent social security offset for death benefits. See *L.E.L. Construction v. Goode*, 92SC837, slip. op. at 6-7 (Colo. Jan. 31, 1994).

Congress' decision to create a committee to study the relationship between social security survivors' benefits and worker's compensation death benefits belies the assertion that Congress intended to preempt state law when it enacted section 402. When Colorado amended section 8-50-103 and added the offset for social security survivors' benefits, it did so at the behest of a Commission designed to provide an alternative to federalization of the workers' compensation system.

III

Section 8-50-103 is not preempted by the Social Security Act. Therefore, although we disagree with the reasoning of the court of appeals, the court of appeals reached the right result. Accordingly, we affirm.

APPENDIX B

The Order of the Supreme Court of Colorado Which Denies Rehearing

SUPREME COURT, STATE OF COLORADO
CASE NO. 92SC689
CERTIORARI TO THE COLORADO COURT OF APPEALS, 91CA1523
INDUSTRIAL CLAIM APPEALS OFFICE, W.C.
No. 3-868-948

ORDER OF COURT

STEVEN L. ROSA (Deceased), CHRISTINA ROSA, JOSHUA ROSA, AMBER ROSA, AND NATHANIEL ROSA,

Petitioners,

v.

WARNER ELECTRICAL CONTRACTING, COLORADO COMPENSATION INSURANCE AUTHORITY, and THE INDUSTRIAL CLAIM APPEALS OFFICE OF THE STATE OF COLORADO,

Respondents.

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 28, 1994.

[SEAL]

cc: Ralph Ogden
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Steven U. Mullens
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John D. Baird
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Timothy M. Tymkovich
Solicitor General
Human Resources Section

Patrick H. Stanford, Clerk
Colorado Court of Appeals

Industrial Claim Appeals Office
The Chancery
1120 Lincoln St., Suite 704
Denver, CO 80203

APPENDIX C

The Opinion of the Colorado Court of Appeals

COLORADO COURT OF APPEALS September 10, 1992
No. 91CA1523

Steven L. Rosa (Deceased), Christina Rosa, Joshua Rosa, Amber Rosa, and Nathaniel Rosa,

Petitioners,

v.

Warner Electrical Contracting; Colorado Compensation Insurance Authority; and The Industrial Claim Appeals Office of the State of Colorado,

Respondents.

Review of Order from the Industrial Claim Appeals Office
of the State of Colorado
WC No. 3-868-948

Division III ORDER AFFIRMED
Opinion by JUDGE SMITH
Criswell and Rothenberg, JJ., concur

Steven U. Mullens, P.C., Steven U. Mullens, Colorado Springs, Colorado; Schur, Olive & Gavaldon, Robert Schur, Fort Collins, Colorado, for Petitioners

Michael J. Steiner, Denver, Colorado, for Respondents Warner Electrical Contracting and Colorado Compensation Insurance Authority

Gale A. Norton, Attorney General, Raymond T. Slaughter, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Jeanne Labuda, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

Christina, Joshua, Amber, and Nathaniel Rosa (claimants), who are dependents of the deceased employee, Steven L. Rosa (decedent), challenge the constitutionality of the workers' compensation offset statute applied by the Industrial Claim Appeals Panel in determining that respondents, Warner Electrical Contracting (employer) and Colorado Compensation Insurance Authority (CCIA), are entitled to offset 100% of claimants' workers' compensation dependency benefits against their social security death benefits. We uphold the constitutionality of the workers' compensation offset statute, §8-50-103, C.R.S. (1986 Repl. Vol. 3B) (now codified with changes at §8-42-114, C.R.S. (1992 Cum. Supp.)).

Respondents admitted liability for decedent's fatal accident. The Administrative Law Judge (ALJ) entered an initial order awarding benefits, and the claim was later reopened to allow claimants an opportunity to address the constitutionality of respondents' offset. Both the ALJ and the Panel allowed the offset, based on the premise that they were required to apply the statute as written.

It is undisputed that, based on decedent's average weekly wage, claimants' workers' compensation benefits amount to $319.73 per week. However, since claimants' combined social security death benefits exceeded the amount of workers' compensation benefits awarded, the entire amount of the workers' compensation benefits was offset by the social security benefits.

I.

Claimants contend that the Colorado workers' compensation offset statute violates the supremacy clause

because the offset mandated by §8-50-103 exceeds the scope of such an offset permitted by the Social Security Act. We are unpersuaded.

The Social Security Act, at 42 U.S.C.A. §424a(d) (1991), permits states to offset workers' compensation benefits if the state statute "under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of wages." Section 8-50-103 provides that, when periodic death benefits under the Social Security Act "are payable to an individual and his dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to one hundred percent of such periodic benefits."

Claimants' argument is founded on the assumption that a conflict exists between these two statutes. They contend that the federal requirement that a state offset be computed "on the basis of wages" is not met by the state offset because the latter is made without regard to wages. Claimants note that, instead, the offset is made dollar for dollar on the amount of the federal benefits, and they argue, therefore, that it does not provide for reduction of workers' compensation benefits on the basis of wages.

Our comparison of the two statutes reveals no such conflict. The federal statute allows the state offset if the claimant is entitled to "*benefits* . . . on the basis of wages," (emphasis added) and not, as claimants urge, if the *offset* is made on the basis of wages. Workers' compensation death benefits, by definition, are based upon two-thirds of the deceased employee's average weekly wage. Section

8-50-103. Accordingly, since claimants are entitled to benefits on the basis of wages, the state offset does not exceed the scope of the state offset permitted by the Social Security Act, and there is no violation of the supremacy clause.

While we acknowledge that another jurisdiction has reached a different conclusion, *see McClanathan v. Smith*, 186 Mont. 56, 606 P.2d 507 (1979), we are unpersuaded by the reasoning employed therein.

II.

Claimants contend also that the state offset constitutes an equal protection violation because benefits of disabled workers are offset by only 50%, while benefits of dependents of deceased workers are offset by 100%. We disagree.

As a preliminary matter, we reject claimants' related contention that the statutory classification of disabled workers and dependents of deceased workers is subject to strict scrutiny.

Claimants argue that the offset is not gender-neutral because the majority of fatally injured workers are men, with the result being that their surviving women spouses are inordinately affected by the disparity in the percentage of offset. However, in support of this argument, claimants cite statistics which are not of record. Thus, this contention cannot be considered. *Subsequent Injury Fund v. Gallegos*, 746 P.2d 71 (Colo. App. 1987); *see Marinez v. Industrial Commission*, 746 P.2d 552 (Colo. 1987).

Because there is no properly admitted evidence showing a suspect classification created by the offset provision, we must uphold the provision unless it creates an arbitrary classification which lacks rational justification. *Boehm v. Industrial Commission*, 738 P.2d 804 (Colo. App. 1987).

We begin with the presumption that the offset provision is valid. *Meyer v. Industrial Commission*, 644 P.2d 46 (Colo. App. 1981).

Meyer, supra, constitutes dispositive precedent holding that the 100% offset provision of §8-50-103 does not constitute a denial of equal protection. There, we concluded that the rational basis for the distinction between the 50% and 100% offsets was that a disabled worker incurs greater expense than the dependents of a deceased worker. Hence, both offsets are rationally related to the goal of preventing duplicative benefits.

Claimants urge us not to follow *Meyer* on the basis that the recent repeal of the 100% offset, and in its stead, the enactment of a 50% offset similar to the one for disabled workers, is an indication that *Meyer* was wrongly decided. However, our inquiry here is limited to determining whether the offset furthers a legitimate state purpose in a rational manner. *Bellendir v. Kezer*, 648 P.2d 645 (Colo. 1982).

A subsequent change in legislation is not necessarily indicative of a lack of any rational basis; at best, it is an indication that the General Assembly is struggling to counter inequities or imperfection in the statutory scheme. But the existence of such imperfections, although they may result in inequalities, does not constitute a

violation of constitutional magnitude so long as a rational basis exists for the discrepancy in classification. *Bellendir v. Kezer, supra.* We articulated that rational basis in *Meyer* and decline to deviate from that decision.

III.

We also reject claimants' final contention that the offset provision is unconstitutional because it deprives them of their property rights without due process.

Again, we follow *Meyer, supra.* In that case, we held that there is no constitutionally protected property rights in workers' compensation benefits, and therefore, §8-50-103 does not infringe upon a claimant's right to due process. Both the rational basis standard employed and the result in *Meyer* are dispositive here.

Accordingly, §8-50-103 is without constitutional defect, and the order of the Panel is affirmed.

JUDGE CRISWELL and JUDGE ROTHENBERG concur.

APPENDIX D

Final Order of the Industrial Claim Appeals Office of the State of Colorado

INDUSTRIAL CLAIM APPEALS OFFICE
1120 LINCOLN STREET – SUITE 704
DENVER, COLORADO 80203

W.C. 3-868-948

IN THE MATTER OF THE CLAIM OF STEVEN L. ROSA (Deceased), CHRISTINA ROSA, JOSHUA ROSA, AMBER ROSA, NATHANIEL ROSA, and STEVEN ROSA,	)	
Claimants,	)	FINAL ORDER
vs.	)	
WARNER ELECTRICAL CONTRACTING,	)	
Employer,	)	
and	)	
COLORADO COMPENSATION INSURANCE AUTHORITY,	)	
Insurer, Respondents.	)	

The claimants seek review of the order of Administrative Law Judge Wheelock (ALJ) insofar as it permits the respondents to offset against dependency benefits, 100% of the social security death benefits received by the claimants. The claimants assert that section 8-42-114, C.R.S. (1990 Cum. Supp.), which provides for this offset, is unconstitutional. Like the ALJ, we have no jurisdiction to consider the constitutionality of a statute. *See Kinterknecht v. Industrial Commission*, 175 Colo. 60, 485 P.2d 721 (1971). We note, however, that the Court of Appeals

has previously upheld the constitutionality of the predecessor statute against equal protection challenges. *See Boehm v. Industrial Commission*, 738 P.2d 804 (Colo. App. 1987); *Meyer v. Industrial Commission*, 644 P.2d 46 (Colo. App. 1981).

IT IS THEREFORE ORDERED that the ALJ's order dated April 22, 1991, is affirmed.

STEVEN L. ROSA
W.C. No. 3-868-948
Page 2

Dated August 27, 1991

FOR THE INDUSTRIAL
CLAIM APPEALS PANEL

/s/ David Cain
David Cain

/s/ Dona Halsey
Dona Halsey

/s/ Barbara Schuman
Barbara Schuman

NOTICE

The Order is final unless an action to modify or vacate this Order is commenced in the Colorado Court of Appeals, 2 East 14th Avenue, Denver, Colorado 80203, by filing a petition to review with the court, with service of a copy of the petition upon the Industrial Claim Appeals Office and all other parties, within twenty (20) days after the date this Order was mailed, pursuant to sections 8-43-301(10) and 307, C.R.S. (1990 Cum. Supp.).

Copies of this decision were mailed August 27, 1991 to the following parties:

Christina Rosa, 4026 Whittier Dr., Colorado Springs, CO 80910

Joshua L. Rosa, 4026 Whittier Dr., Colorado Springs, CO 80910

Amber & Nathaniel Rosa, 4026 Whittier Dr., Colorado Springs, CO 80910

Warner Electrical Co. d/b/a WECCO Co., 319 N. Bonfoy Ave., Colorado Springs, CO 80909

Colorado Compensation Insurance Authority, Attn: R. Stanley, Esq. Interagency Mail

Steven U. Mullens, Esq., 321 S. Tejon, Colorado Springs, CO 80903 (For the Claimant)

By: /s/ Illegible
tlj

APPENDIX E

Findings of Fact, Conclusions of Law and Order of the Administrative Law Judge of the Workmen's Compensation Section of the Colorado Division of Labor and Employment

STATE OF COLORADO
BEFORE THE DIVISION OF LABOR AND
EMPLOYMENT DIVISION OF LABOR WORKER'S
COMPENSATION SECTION

IN THE MATTER OF THE CLAIM OF STEVEN L. ROSA (Deceased), Claimant, vs. WARNER ELECTRICAL CONTRACTING, Employer, and COLORADO COMPENSATION INSURANCE FUND, S.A. No. C87-23773 Insurer, Respondents.	W. C. NO. 3-868-948 FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

Hearing was held in the above-captioned matter on November 16, 1990, before Cullen A. Wheelock, Administrative Law Judge, in Colorado Springs. Claimant was represented by Attorney, Steven U. Mullens. Respondents were represented by Russell A. Stanley, Counsel, Colorado Compensation Insurance Authority. The court reporter was Nancy Dorland.

ISSUES

The issues designated for hearing were average weekly wage; whether Respondents were entitled to 100% off-set for Social Security benefits provided to Claimant's widow and dependents in this case under

8-42-114 C.R.S., formerly 8-50-103 C.R.S.; and the constitutionality of the statutory provision that allows for the 100% off-set of Social Security fatal benefits when death has occurred as the result of an on-the-job injury, as opposed to 50% off-set of Social Security benefits paid for disability benefits when the injury has been serious enough to entitle the injured Claimant to Social Security benefits when no death has resulted.

Counsel for the parties stipulated at hearing as follows:

1. At the time of Claimant's death on July 2, 1987, he was earning $450.00 per week with no fringe benefits. However, as reflected in the Employer's records, Claimant received an average weekly wage of $520.00 per week, or $13.00 per hour, through August 13, 1986. Beginning August 20, 1986, Claimant's average weekly wage was reduced to $450.00, or $11.25 per hour.

2. Claimant received certain fringe benefits until January, 1987, and said fringe benefits were discontinued after that date.

3. Because Claimant's dependents receive $1,424.00 per month in Social Security benefits, or $328.62 per week, no workmen's compensation benefits are being paid. Claimant's widow feels that this 100% offset is unconstitutional and that the 50% offset should be applicable.

Based on the foregoing stipulations, materials of record, and the Administrative Law Judge being fully advised, does enter the following:

FINDINGS OF FACT

1. Steven L. Rosa died on July 2, 1987, as a result of electrocution suffered in the course of his employment with Respondent-Employer, Warner Electrical Contracting. Mr. Rosa's date of birth was May 19, 1956.

2. At the time of Steven Rosa's death, based on one year's income, it is found that Mr. Rosa's average weekly wage was $479.59 per week.

3. On the date of Steven L. Rosa's death, he was married to Christina Rosa. There were three (3) children of this marriage. The childrens' names and dates of birth are: Joshus Louis, dob, September 10, 1977; Amber Maria, dob July 12, 1979; and Nathaniel Kemp, dob, March 10, 1983.

4. Widow, Christina Rosa, and the three (3) Rosa children receive $356.00 per month (initial rate) fatal benefits from Social Security, on the account of Steven Rosa, as a result of the fatal electrocution suffered by Steven Rosa which forms the basis of this worker's compensation claim.

Based on the foregoing, the Administrative Law Judge, includes the following brief:

DISCUSSIONS OF CASE

1. Widow, Christina Rosa, on behalf of herself and her infant children raises an issue as to the constitutionality of the statutory scheme that allows for the worker's compensation carrier to off-set worker's compensation death benefits by 100% of the Social Security

fatal benefits that would otherwise be subject to 50% of the Social Security benefits in the event that Steven L. Rosa had merely been seriously injured instead of killed in this compensable accident. While this issue and the question of the constitutionality of off-set in fatal compensation claims has been previously addressed by the Colorado Supreme Court, it may be that the Colorado Supreme Court will want to review this matter again. Nevertheless, the Administrative Law Judge is without authority to address constitutional issues such as are raised by Christina Rosa.

Wherefore, the Administrative Law Judge does enter the following:

ORDER

1. The Administrative Law Judge does not have the authority to rule on the constitutionality of 100% vs. 50% off-set of Social Security benefits set forth in C.R.S. 8-42-114 C.R.S., formerly 8-50-113 C.R.S.

2. Effective July 3, 1987, Respondent-Carrier shall pay benefits at the weekly rate of $319.73, less applicable Social Security offsets to dependents Christina Rosa for her use and for use of dependent children Joshua, Amber, and Nathaniel Rosa.

3. Respondents shall pay 8% per annum interest on all amounts of compensation not paid when due.

4. All other issues not set out in this Order shall remain open for future determination.

DATED this 22nd day of April , 1991.

DIVISION OF LABOR
WORKMEN'S COMPENSATION
SECTION FOR THE DIRECTOR

BY /s/ Cullen A. Wheelock
Cullen A. Wheelock
Administrative
Law Judge

The decision of the Administrative Law Judge is final unless a Petition to Review this decision is filed within twenty (20) days from the date this decision is mailed. The Petition to Review should be filed with the Division of Labor, 20 East Vermijo Street, Room 407, Colorado Springs, Colorado 80903.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Findings Of Fact Conclusions Of Law And Order was mailed to the following parties this 23rd day of April , 1991, to:

Russell A. Stanley, Esq.
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Denver, CO 80203

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Colorado Springs, CO 80903

/s/ Illegible

APPENDIX F

Partial Text of 42 U.S.C. § 402(d)

(d) Child's insurance benefits. (1) Every child (as defined in section 216(e) [42 USCS § 416(e)]) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child –

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time elementary or secondary school student and had not attained the age of 19, or (ii) is under a disability (as defined in section 223(d) [42 USCS § 423(d)]) which began before he attained the age of 22, and

(C) was dependent upon such individual –

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with –

(i) in the case of a child (as so defined) of such an individual who has died, the first month in which such child meets the criteria specified in subparagraphs (A), (B), and (C), or

(ii) in the case of a child (as so defined) of an individual entitled to an old age insurance benefit or to a disability insurance benefit, the first month throughout which such child is a child (as so defined) and meets the criteria specified in subparagraphs (B) and (C) (if in such month he meets the criterion specified in subparagraph (A)), which is earlier, and ending with the month preceding whichever of the following first occurs –

(D) the month in wnich such child dies, or marries,

(E) the month in which such child attains the age of 18, but only if he (i) is not under a disability (as so defined) at the time he attains such age, and (ii) is not a full-time elementary or secondary school student during any part of such month,

(F) if such child was not under a disability (as so defined) at the time he attained the age of 18, the earlier of –

(i) the first month during no part of which he is a full-time elementary or secondary school student, or

(ii) the month in which he attains the age of 19, but only if he was not under a disability (as so defined) in such earlier month; or

(G) if such child was under a disability (as so defined) at the time he attained the age of 18 or if he was not under a disability (as so defined) at such time but was under a disability (as so defined) at or prior to the time he attained (or would attain) the age of 22 –

(i) the termination month, subject to section 223(e) [42 USCS § 423(e)] (and for purposes of this subparagraph, the termination month for any individual shall be the third month following the month in which his disability ceases; except that, in the case of an individual who has a period of trial work which ends as determined by application of section 222(c)(4)(A) [42 USCS § 422(c)(4)(A)], the termination month shall be the earlier of (I) the third month following the earliest month after the end of such period of trial work with respect to which such individual is determined to no longer be suffering from a disabling physical or mental impairment, or (II) the third month following the earliest month in which such individual engages or is determined able to engage in substantial gainful activity, but in no event earlier than the first month occurring after the 36 months following such period of trial work in which he engages or is determined able to engage in substantial gainful activity),

or (if later) the earlier of –

(ii) the first month during no part of which he is a full-time elementary or secondary school student, or

(iii) the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month.

Entitlement of any child to benefits under this subsection on the basis of the wages and self-employment income of an individual entitled to disability insurance benefits shall also end with the month before the first month for which such individual is not entitled to such benefits unless such individual is, for such later month, entitled to old-age insurance benefits or unless he dies in such month. No payment under this paragraph may be made to a child who would not meet the definition of disability in section 223(d) [42 USCS § 423(d)] except for paragraph (1)(B) thereof for any month in which he engages in substantial gainful activity.

(2) Such child's insurance benefit for each month shall, if the individual on the basis of whose wages and self-employment income the child is entitled to such benefit has not died prior to the end of such month, be equal to one-half of the primary insurance amount of such individual for such month. Such child's insurance benefit for each month shall, if such individual has died in or prior to such month, be equal to three-fourths of the primary insurance amount of such individual.

[Paragraphs (3) through (9) contain detailed eligibility criteria and are omitted because they have no bearing on this case.]

APPENDIX G

Complete Text of 42 U.S.C. § 402(g)

(g) Mother's and father's insurance benefits. (1) The surviving spouse and every surviving divorced parent (as defined in section 216(d) [42 USCS § 416(d)]) of an individual who died a fully or currently insured individual, if such surviving spouse or surviving divorced parent –

(A) is not married,

(B) is not entitled to a surviving spouse's insurance benefit,

(C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,

(D) has filed application for mother's or father's insurance benefits, or was entitled to a spouse's insurance benefit on the basis of the wages and self-employment income of such individual for the month preceding the month in which such individual died,

(E) at the time of filing such application has in his or her care a child of such individual entitled to a child's insurance benefit, and

(F) in the case of a surviving divorced parent –

(i) the child referred to in subparagraph (E) is his or her son, daughter, or legally adopted child, and

(ii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income,

shall (subject to subsection (s)) be entitled to a mother's or father's insurance benefit for each month, beginning with the first month in which

> he or she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: no child of such deceased individual is entitled to a child's insurance benefit, such surviving spouse or surviving divorced parent becomes entitled to an old-age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of such deceased individual, he or she becomes entitled to a surviving spouse's insurance benefit, he or she remarries, or he or she dies. Entitlement to such benefits shall also end, in the case of a surviving divorced parent, with the month immediately preceding the first month in which no son, daughter, or legally adopted child of such surviving divorced parent is entitled to a child's insurance benefit on the basis of the wages and self-employment income of such deceased individual.

(2) Except as provided in paragraph (4) of this subsection, such mother's or father's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such deceased individual.

(3) In the case of a surviving spouse or surviving divorced parent who marries –

> (A) an individual entitled to benefits under this subsection or subsection (a), (b), (c), (e), (f), or (h), or under section 223(a) [42 USCS § 423(a)], or
>
> (B) an individual who has attained the age of eighteen and is entitled to benefits under subsection (d),

the entitlement of such surviving spouse or surviving divorced parent to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) but subject to subsection (s), not be terminated by reason of such marriage.

(4)(A) The amount of a mother's or father's insurance benefit for each month (as determined after application of the provisions of subsection (k)) shall be reduced (but not below zero) by an amount equal to two-thirds of the amount of any monthly periodic benefit payable to the individual for such month which is based upon the individual's earnings while in the service of the Federal Government or any State (or political subdivision thereof, as defined in section 218(b)(2) [42 USCS § 418(b)(2)]) if, on the last day the individual was employed by such entity –

> (i) such service did not constitute "employment" as defined in section 210 [42 USCS § 410], or
>
> (ii) such service was being performed while in the service of the Federal Government, and constituted "employment" as so defined solely by reason of –
>
> (iii) (I) clause (ii) or (iii) of subparagraph (G) of section 210(a)(5) [42 USCS § 410(a)(5)], where the lump-sum payment described in such clause (ii) or the cessation of coverage described in such clause (iii) (whichever is applicable) was received or occurred on or after January 1, 1988, or
>
> (II) an election to become subject to the Federal Employees' Retirement

System provided in chapter 84 of title 5, United States Code (5 USCS §§ 8401 et seq.], or the Foreign Service Pension System provided in subchapter II of chapter 8 of title I of the Foreign Service Act of 1980 (22 USCS §§ 4071 et seq.] made pursuant to law after December 31, 1987,

unless subparagraph (B) applies.

The amount of the reduction in any benefit under this subparagraph, if not a multiple of $0.10, shall be rounded to the next higher multiple of $0.10.

(B) Subparagraph (A)(ii) shall not apply with respect to monthly periodic benefits based in whole or in part on service which constituted "employment" as defined in section 210 [42 USCS § 410] if such service was performed for at least 60 months in the aggregate during the period beginning January 1, 1988, and ending with the close of the first calendar month as of the end of which the individual is eligible for benefits under this subsection and had made a valid application for such benefits.

(C) For purposes of this paragraph, any periodic benefit which otherwise meets the requirements of subparagraph (A), but which is paid on other than a monthly basis, shall be allocated on a basis equivalent to a monthly benefit (as determined by the Secretary) and such equivalent monthly benefit shall constitute a monthly periodic benefit for purposes of subparagraph (A). For purposes of this subparagraph, the term "periodic benefit" includes a benefit payable in

a lump sum if it is a commutation of or a substitute for, periodic payments.

APPENDIX H

Complete Text of USC § 424a

§ 424a. Reduction of disability benefits

(a) Conditions for reduction; computation. If for any month prior to the month in which an individual attains the age of 65 –

(1) such individual is entitled to benefits under section 223 [42 USCS § 423], and

(2) such individual is entitled for such month to –

(A) periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workmen's compensation law or plan of the United States or a State, or

(B) periodic benefits on account of his or her total or partial disability (whether or not permanent) under any other law or plan of the United States, a State, a political subdivision (as that term is used in section 218(b)(2) [42 USCS § 418(b)(2)]), or an instrumentality of two or more States (as that term is used in section 218(g) [42 USCS § 418(g)]), other than (i) benefits payable under title 38, United States Code [38 USCS §§ 101 et seq.], (ii) benefits payable under a program of assistance which is based on need, (iii) benefits based on service all or substantially all of which was included under an agreement entered into by a State and the Secretary under section 218 [42 USCS § 418], and (iv) benefits under a law or plan of the United States based on service all or substantially all of which is employment as defined in section 210 [42 USCS § 410],

the total of his benefits under section 223 [42 USCS § 423] for such month and of any benefits under section 202 [42 USCS § 402] for such month based on his wages and self-

employment income shall be reduced (but not below zero) by the amount by which the sum of –

> (3) such total of benefits under sections 223 and 202 [42 USCS § 423, 402] for such month, and
>
> (4) such periodic benefits payable (and actually paid) for such month to such individual under such laws or plans,

exceeds the higher of –

> (5) 80 per centum of his "average current earnings", or
>
> (6) the total of such individual's disability insurance benefits under section 223 [42 USCS § 423] for such months and of any monthly insurance benefits under section 202 [42 USCS § 402] for such month based on his wages and self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 223 and 202 [42 USCS §§ 423, 402] for a month (in a continuous period of months) reduce such total below the sum of –

> (7) the total of the benefits under sections 223 and 202 [42 USCS §§ 423, 402], after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and

(8) any such increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made.

For purposes of clause (5), an individual's average current earnings means the largest of (A) the average monthly wage (determined under section 215(b) [42 USCS § 415(b) as in effect prior to January 1979) used for purposes of computing his benefits under section 223 [42 USCS § 423], (B) one sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in section 209(a)(1) and 211 (b)(1) [42 USCS §§ 409(a)(1), 411(b)(1)]) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest, or (C) one twelfth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 209(a)(1) and 211(b)(1) [42 USCS §§ 409(a)(1)] 411(b)(1)]), for the calendar year in which he had the highest such wages and income during the period consisting of the calendar year in which he became disabled (as defined in section 223(d) [42 USCS § 423(d)]) and the fives years preceding that year.

(b) Reduction where benefits payable on other than monthly basis. If any periodic benefit for a total or partial disability under a law or plan described in subsection (a)(2) is payable on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction under this section shall be made at such time or times and in such amounts as the Secretary finds will approximate

as nearly as practicable the reduction prescribed by subsection (a).

(c) Reductions and deductions under other provisions. Reduction of benefits under this section shall be made after any reduction under subsection (a) of section 203 [42 USCS § 403(a)], but before deductions under such section and under section 222(b) [42 USCS § 422(b)].

(d) Exception. The reduction of benefits required by this section shall not be made if the law or plan described in subsection (a)(2) under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this title [42 USCS §§ 401 et seq.] on the basis of the ages and self-employment income of an individual entitled to benefits under section 223 [42 USCS § 423], and such law or plan so provided on February 18, 1981.

(e) Conditions for payment. If it appears to the Secretary that an individual may be eligible for periodic benefits under law or plan which would give rise to reduction under this section, he may require, as a condition of certification for payment of any benefits under section 223 [42 USCS § 423] to any individual for any month and of any benefits under section 202 [42 USCS § 402] for such month based on such individual's wages and self-employment income, that such individual certify (i) whether he has filed or intends to file any claim for such periodic benefits, and (ii) if he has so filed, whether there has been a decision on such claim. The Secretary may, in the absence of evidence to the contrary, rely upon such a certification by such individual that he has not filed and does not intend to file such a claim, or that he has so filed and no final

decision thereon has been made, in certifying benefits for payment pursuant to section 205(i) [42 USCS § 405(i)].

(f) Redetermination of reduction. (1) In the second calendar year after the year in which reduction under this section in the total of an individual's benefits under section 223 [42 USCS § 423] and any benefits under section 202 [42 USCS § 402] based on his wages and self-employment income was first required (in a continuous period of months), and in each third year thereafter, the Secretary shall redetermine the amount of such benefits which are still subject to reduction under this section; but such redetermination shall not result in any decease in the total amount of benefits payable under this section in the total of an individual's wages and self-employment income. Such redetermined benefit shall be determined as of, and shall become effective with, the January following the year in which such redetermination was made.

(2) In making the redetermination required by paragraph (1), the individual's average current earnings (as defined in subsection (a)) shall be deemed to be the product of –

> (A) his average current earnings as initially determined under subsection (a);
>
> (B) the ratio of (i) the deemed average total wages (as defined in section 209(k)(1) [42 USCS § 409(k)(1)]) for the calendar year before the year in which such redetermination is made to (ii)(I) the average of the total wages (as defined in regulations of the Secretary and computed without

regard to the limitations specified in section 209(a)(1) [42 USCS § 409(a)(1)]) reported to the Secretary of the Treasury or his delegate for calendar year 1977 or, if later, the calendar year before the year in which the reduction was first computed (but not counting any reduction made in benefits for a previous period of disability), if such calendar year is before 1991, or (II) the deemed average total wages (as defined in section 209(k)(1) [42 USCS § 409(k)(1)]) for the calendar year before the year in which the reduction was first computed (but not counting any reduction made in benefits or a previous period of disability), if such calendar year is after 1990; and

(C) in any case in which the reduction was first computed before 1978, the ratio of (i) the average of the taxable wages reported to the Secretary for the first calendar quarter of 1977 to (ii) the average of the taxable wages reported to the Secretary for the first calendar quarter of the calendar year before the year in which the reduction was first computed (but not counting any reduction made in benefits for a previous period of disability).

Any amount determined under this paragraph which is not a multiple of $1 shall be reduced to the next lower multiple of $1.

(g) Proportionate reduction; application of excess. Whenever a reduction in the total of benefits for any month based on an individuals' wages and self-employment income is made

under this section, each benefit, except the disability insurance benefit, shall first be proportionately decreased, and any excess of such reduction over the sum of all such benefits other than the disability insurance benefit shall then be applied to such disability insurance benefit.

(h) Furnishing of information. (1) Notwithstanding any other provision of law, the head of any Federal agency shall provide such information within its possession as the Secretary may require for purposes of making a timely determination of the amount of the reduction, if any, required by this section in benefits payable under this title [42 USCS §§ 401 et seq.], or verifying other information necessary in carrying out the provisions of this section.

(2) The Secretary is authorized to enter into agreements with States, political subdivisions, and other organizations that administer a law or plan subject to the provisions of this section, in order to obtain such information as he may require to carry out the provisions of this section.

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No. 93-1916

In The

Supreme Court of the United States

October Term, 1993

STEVEN L. ROSA (Deceased), CHRISTINA ROSA, JOSHUA ROSA, AMBER ROSA and NATHANIEL ROSA,

Petitioners,

vs.

WARNER ELECTRICAL CONTRACTING, COLORADO COMPENSATION INSURANCE AUTHORITY and THE INDUSTRIAL CLAIM APPEALS OFFICE OF THE STATE OF COLORADO,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Colorado

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state statute which reduces workers' compensation benefits by the amount of Social Security benefits received is preempted by the Social Security Act even though there is no indication of a congressional intent to preempt state law.

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No. 93-1916

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STEVEN L. ROSA (Deceased), CHRISTINA ROSA, JOSHUA ROSA, AMBER ROSA and NATHANIEL ROSA,

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Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Colorado

BRIEF IN OPPOSITION

OPINION BELOW

The Colorado Supreme Court ruled, at 870 P.2d 1210 (Colo. 1993) that the state statute did not violate the Social Security Act.

JURISDICTION

Respondents concede that the petitioners have timely sought certiorari pursuant to 28 U.S.C. § 2857.

STATEMENT OF THE CASE

This case involves the Colorado Workers' Compensation Act, which requires offsets against the benefits of the dependents of deceased workers if the dependents receive survivors' benefits from Social Security or a workers' compensation program of another state or of the federal government. Section 8-50-103, 3B C.R.S. (1986), now found at section 8-42-114, C.R.S. This provision has been in the Act since 1975. 1975 Colo. Session Laws, ch. 271, p. 299.

Petitioners are the widow and children of Steven Rosa, who died while working for Warner Electrical Contracting. They receive Social Security survivors' benefits, which were offset against their Workers' Compensation benefits pursuant to section 8-50-103, 3B C.R.S. (1986).

REASONS FOR DENYING THE WRIT

Petitioners have asked that the court grant a writ of certiorari to resolve the issue of whether, under the doctrine of implied preemption, federal law precludes the amount of benefits paid to Social Security recipients from being offset against some other benefits to which the recipients are entitled. The petition fails to mention the Colorado Supreme Court's thorough review of this issue.

The petition also fails to mention *any* preemption case decided by this court, despite the substantial case law in this area. Finally, the petition fails to acknowledge a long line of cases over nearly 40 years in which courts have upheld offsets of Social Security benefits.

Analyses of federal preemption issues begin with "the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725 (1981). Where Congress legislates "in a field which the states have traditionally occupied" courts will not apply preemption unless that is the "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

There are several ways to show congressional intention to preempt state law. Congress can, of course, expressly declare that the states are precluded from legislating in an area of law. Petitioners have not claimed that any express language exists anywhere in the Social Security Act to prohibit states from offsetting Social Security survivors' benefits against workers' compensation benefits.

If Congress does not expressly preclude state legislation, preemption can still be found under the doctrines of implied preemption or conflict preemption, which are explained in *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 203-204 (1983). Preemption will be implied if the federal regulatory scheme is so pervasive or the federal interest is so dominant that state law must be assumed to

be precluded. This is sometimes referred to as a congressional intent to "occupy the field." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748 (1985).

Under conflict preemption, state laws must fall if compliance with both federal and state law is "a physical impossibility" or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

The preemption doctrine is rarely used to strike down state legislation. There must be " . . . persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963). As Professor Tribe has said, " . . . state action is preempted only if it specifically frustrates fairly narrow and concrete objectives that underlie federal enactments . . . " but there is no preemption merely because a state law " . . . is in general tension with broad or abstract goals that may be attributed to various federal law or programs." Tribe, *American Constitutional Law* (1988), p. 497.

Petitioners have argued that the offset statute is invalid because it "decreases the value of the recipient's Social Security award." However, that argument has been rejected in a long line of cases going back to 1955, in which courts have upheld offsets of Social Security benefits. The first case was *Hurd v. Illinois Bell Telephone Co.*, 136 F. Supp. 125 (N.D. Ill. 1955). The plaintiffs in that case argued that a reduction of pension benefits was an improper assignment of benefits because it would cause "a corresponding shift in the economic benefit of the

Social Security payment . . . " *Id.* at 141. That is precisely the same argument made in the case at bar.

The court rejected this argument and ruled that the Social Security Act "was never intended to freeze a worker's private pension at a particular level." *Id.* at 142.

In reaching this result, the court carefully examined the legislative history of the Social Security Act. The court concluded that when the Act was first enacted and later amended there was "no doubt" that Congress was well aware that offsets would be taken and did not intend to invalidate offsets. *Id.* at 142-143, 148-149. *Hurd* was affirmed by the Seventh Circuit at 234 F.2d 942 (7th Cir. 1956).

Many other courts have reached the same result. *See Freier v. New York Life Insurance Co.*, 679 F.2d 780 (9th Cir. 1982); *Lamb v. Connecticut General Life Ins. Co.*, 643 F.2d 108 (3rd. Cir. 1981), *cert. denied*, 454 U.S. 836 (1981); *Stuart v. Metropolitan Life Ins. Co.*, 664 F. Supp. 619 (D. Me. 1987), *affirmed*, 849 F.2d 1534 (1st Cir. 1988), *cert. denied*, 488 U.S. 968 (1988); *Poisson v. Allstate Life Ins. Co.*, 640 F. Supp. 147 (D. Me. 1986); *Harris v. State Department of Labor and Industries*, 843 P.2d 1056 (Wash. 1993); *Pyke v. Department of Social Services*, 453 N.W.2d 274 (Mich. App. 1990); and *Lessard v. Metropolitan Life Ins. Co.*, 568 A.2d 491, 499 (Me. 1989).

Petitioners are correct that the ruling in *McClanathan v. Smith*, 186 Mont. 56, 606 P.2d 507 (1980) is generally consistent with their theory even though it involved disability benefits, rather than survivors' benefits. In that case the court concluded that an offset statute " . . . is in total opposition to federal legislation, in that it deprives a

claimant of benefits provided by Social Security legislation . . . " However, the court offered no explanation whatever for its ruling.

Petitioners rely more heavily on *Raskin v. Moran*, 684 F.2d 472 (7th Cir. 1982), which involved a Wisconsin statute on the salaries of retired judges who continued on the bench. The statute provided that the judges' salaries were reduced dollar for dollar by the amount of their Social Security retirement benefits. The judges argued that the statute was preempted by 42 U.S.C. § 403(f)(3), which provides that the retirement benefits of recipients who are 70 years old or older will not be reduced by their earned income. The court held that although the offset did not directly affect the judges' Social Security benefits, the effect of the Wisconsin statute was "the functional equivalent" of such a deprivation and it represented "a clear frustration" of the purpose of the "quite apparent underlying goals of the federal statute." *Id.* at 479, 480.

Respondents do not concede that *Raskin* was decided correctly. It is also easily distinguished. Section 403(f)(3) sets forth a clear intent to encourage recipients of *retirement* benefits to work. There is no such intent in the Act to encourage duplications of *survivors'* benefits from various income maintenance programs.

Since 1982, when *Raskin* was decided, only four cases have cited it on the preemption issue. In no case was it followed.

Barnes v. District of Columbia, 611 F. Supp. 130 (D.D.C. 1985) involved retired military officers who worked for District of Columbia. Their salary was reduced dollar for dollar by the amount of their retirement benefits. They

argued that this offset was preempted by a federal statute that salaries of military retirees who worked for the federal government were not reduced. The court ruled that "the plaintiffs misconceive the role of the Supremacy Clause in serving as a check on local legislation." The court distinguished *Raskin* because the statute at issue had no "clear goal of protecting federal benefits", as did the statute in *Raskin*.

Raskin was distinguished on the same basis in *Harris v. State Department of Labor and Industries, supra*. That case involved a reverse offset of retirement benefits. The court said that in contrast to *Raskin* and the statute involved in that case, there was no "clear evidence of congressional intent to preempt state reverse offsets of federal social security retirement benefits. We decline to infer preemption from Congress's silence."

In *Pyke v. Department of Social Services, supra,* the court also distinguished *Raskin* on the ground that it was based on express statutory intent that federal payments not affect the receipt of other payments.

In *Pennsylvania Medical Society v. Marconis,* 942 F.2d 842 (3rd Cir. 1991), the plaintiffs ruled that a Pennsylvania statute limiting the amounts doctors could charge Medicare recipients was not preempted by the Medicare statute, which is Title XVIII of the Social Security Act. *Raskin* was cited in dissent.

CONCLUSION

Petitioners concede that no specific language in the Social Security Act prohibits offsetting survivors' benefits against workers' compensation benefits. No case has ever prohibited an offset of survivors' benefits.

There is no question that workers' compensation has traditionally been handled by the states, rather than by the federal government. Therefore, preemption will not apply unless that is the "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp., supra.* Petitioners have offered no evidence of any such purpose.

Section 8-50-103, C.R.S. (1986) does not conflict with the Social Security Act. The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 93-1916

In The

Supreme Court of the United States

October Term, 1994

STEVEN L. ROSA (deceased), CHRISTINA ROSA, JOSHUA ROSA, AMBER ROSA, and NATHANIAL ROSA,

Petitioners,

v.

WARNER ELECTRICAL CONTRACTING, COLORADO COMPENSATION INSURANCE AUTHORITY, and THE INDUSTRIAL CLAIM APPEALS OFFICE OF THE STATE OF COLORADO,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Colorado

REPLY BRIEF FOR THE PETITIONERS

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I

This case raises the question of whether it is for Congress or the states to decide when the states may reduce their otherwise payable public assistance benefits on the basis that federal benefits are also payable to the same person.

If this power lies with Congress rather than the states, it would seem that the states could not act unless Congress expressly or by necessary implication tells them

they may do so. Furthermore, where some offsets are authorized, those which are not mentioned in the authorization would be forbidden under the doctrine of "expressio unius est exclusio alterius" – the inclusion of one is the exclusion of others. *National Railroad Passenger Corporation v. National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974).

Conversely, if it is for the states to decide whether state and federal benefits duplicate each other to the extent that only federal benefits should be paid, the states would not need express Congressional permission and could enact offset statutes at will unless Congress expressly forbids them.

The effect of recognizing this power at either the state or federal level will be significant: If it resides with the states, they can shift a significant portion of the social welfare burden to the federal government without Congress' approval. This in turn shifts a significant portion of social welfare policy making to the states since they are reducing their programs while increasing those funded by the federal government.

Since the propriety of this shift, as well as the question of where the power lies to make it, is not settled, it should be determined in this case on certiorari. This will provide guidance to Congress and the several state legislatures as to their respective powers and the validity of a number of social welfare and retirement benefit laws.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition for certiorari, this Court should issue a writ of certiorari to review the January 31, 1994, judgment and opinion rendered by the Supreme Court of Colorado in this case and resolve a significant issue which concerns the relationships between state and federal governments and the public assistance benefits which they pay or mandate others to pay.

Respectfully submitted,

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